IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

MONDAY, THE FOURTH DAY OF JULY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE B.PRAKASH RAO

WRIT PETITION NO : 15535 of 2004

Between:

M/s.Reliance Energy Ltd., Reliance Energy Centre Santa Cruz (E),
Mumbai-400055. rep. By its Executive Director.

... PETITIONER

AND

1 Transmission Corporation of A.P.Ltd., Vidyut Soudha, Hyderabad. Rep. By its Chairman and Managing Director.
2 GAIL (India) Limited 16, Bhilkaji Cama Place R.K.Puram,
New Delhi-110066. rep. By its Chairman and Managing Director.
3 Zonal General Manager GAIL (India) Ltd., 6-3-871 3rd floor, Snehalata Complex, Begumpet, Hyd.
4 M/s. G.V.K. Industries Limited, Rep. by its Director S. Bhupal, S/o. Late Krishna Ram Bhupal
R/o. Hyderabad. Registered Office at Paigah House, S.P. Road, Secunderabad.
5 M/s. Spectrum Power Generation Limited, Having its Office at D.No. 6-28 & 6-29, Saroornagar, Hyderabad.
6 M/s. Lanco Kondapally Power Private Limited, a Private Limited Company having its Registered Office at Road No.2 Banjara Hills, Hyderabad. Rep. by its Company Secretary Sri D. Krishna Rao,S/o. Seshaiah, R/o. Hyderabad.
(RR4 to RR6 are impleaded as per Court Order Dt. 9-9-04 in WPMP's 20732, 20907 &20911/04 respectively.

...RESPONDENTS

Petition under Article 226 of the constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue an appropriate writ, order or direction more particularly one in the nature of Mandamus declaring the action of the respondents
2 and 3 in deciding to revise vide letter of the 2nd respondent dated
23-08-2004 the earlier decision of allocating 0.3 MMSCMD of additional quantity of natural gas available from Ravva satellite field be supplied to the petitioner's plant

on the basis of the recommendations of the 1st respondent, to all the power plants' in the State of Andhra Pradesh on prorata basis ignoring the terms of PPA between the petitioner and the 1st respondent and the recommendations of the 1st respondent as irrational, arbitrary and discriminatory and consequently direct the respondent 2 and 3 to continue to supply the additional quantity of 0.30 MMSCMD of natural gas availabel from ravva satellite filed to the petitioner.

Counsel for the Petitioner: MR.B.ADINARAYANA RAO

Counsel for the Respondents: SMT.M.VINOBHA DEVI

The Court made the following:

THE HON'BLE MR JUSTICE B.PRAKASH RAO

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WRIT PETITION NO : 15535 of 2004

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ORDER:

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Heard Sri B. Adinarayana Rao, learned counsel appearing on behalf of the petitioner, Smt. M. Vinobha Devi, learned Standing Counsel for the 1st

respondent,

Sri E. Manohar and Sri S.R. Ashok, learned senior counsel, for the other contesting respondents.

This petition is filed seeking writ of *Mandamus* declaring the action of the respondents 2 and 3 in deciding to revise vide letter of the 2nd respondent, dated 23-08-2004, the earlier decision of allocating 0.3 MMSCMD of additional quantity of natural gas available from Ravva Satellite Field be supplied to the petitioner's plant on the basis of the recommendations of the 1st respondent, to all the power plants' in the State of A.P. on pro-rata basis ignoring the terms of Power Purchase Agreement (for short 'PPA') between the petitioner and the 1st respondent and the recommendations of the 1st respondent as irrational, arbitrary and discriminatory and consequently to direct the respondents 2 and 3 to continue to supply the additional quantity of 0.30 MMSCMD of natural gas available from Ravva Satellite field to the petitioner.

The case of the petitioner is that initially it was incorporated as BSES Limited in the year 1929 under the Companies Act, 1913 and later changed its nomenclature as Reliance Energy Limited having obtained a fresh Certificate of Incorporation from the Registrar of Companies. Primarily the petitioner was engaged in generation and distribution of electrical energy. One M/s. BSES Andhra Power Limited had set up a power plant at Samalkot of East Godavari District, Andhra Pradesh for generating electrical energy of 22 MW and the said company merged with the petitioner company with effect from 01-04-2003.

The 2nd respondent herein, which is an undertaking of a Government of India entrusted with the object of marketing of natural gas produced by Oil and Natural Gas Commission and other joint venture companies. The 2nd respondent had a vast network of pipelines for distributing the natural gas and shall have to supply the natural gas through the said pipelines to various industries to whom allotments are made by the Gas Linkage Committee, which was established by the Government of India in the year 1991. According to the petitioner, the said Gas Linkage Committee allocates the natural gas to the various applicants depending on the requirements of the industry and

availability of the gas.

The allocations will be either on firm or on fallback basis. Pursuant to the said allocations made by the Gas Linkage Committee and approved by the Ministry of Petroleum and Natural Gas, the 2nd respondent entered into agreements with the industries for supply of natural gas. However, the price of the natural gas is controlled by the Government of India, whereas the 2nd respondent has absolutely no say in the said price fixation. It is also pointed out that the 2nd respondent is totally under the control of the Ministry of Petroleum and Natural Gas, Government of India and virtually regulated by the policy decision of the Government of India from time to time. Thus the 2nd respondent is a "State" within the meaning of Article 12 of the Constitution of India.

With a view to encourage the private participation in the power sector, the Government of India liberalized the procedures for grant of sanction to set up power projects and made necessary amendments to the Electricity (Supply) Act, 1948 and having regard to the nature of demand, the petitioner's power plant was sanctioned at Samalkot with a permission to set up 220 MW power plant with 'Natural Gas' as primary fuel and 'Naphtha' as alternative fuel.

The petitioner had entered into a PPA with the 1st respondent whereunder the 1st respondent agreed to purchase the power generated by the said plant as per the terms and conditions set out in the said PPA, which was later amended pursuant to the directions of the A.P. Electricity Regulatory Commission. The 1st respondent agreed to pay the fixed costs calculated as per the terms set out in the PPA on yearly basis, provided the plant achieves a Plant Load Factor (for short 'PLF') of 85%.

In other words, if the plant achieves generation of electrical energy to the tune of 85% of its capacity, it would be able to recover the fixed charges and if it fails to achieve the same, the plant is liable to pay penalties at the rate of 20 paise for Kwhr to the extent of the short fall. To enable the company to achieve the said PLF, the basis requirement is availability of natural gas for the reason that the plant is not permitted to operate on alternative fuel, as naphtha is highly expensive compared to natural gas. While the petitioner's power plant requires about 1.00 MMSCMD of natural gas to operate the plant to its full capacity, 0.94

MMSCMD of natural gas is required for achieving the 85% PLF. But the GLC had allocated 0.64 MMSCMD of natural gas on firm basis and 0.36 MMSCMD on fallback basis. When compared to the other power plants in the State of Andhra Pradesh, the allocation of natural gas to the petitioner is totally inequitable as shown below:

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Company	**RequirementIn MMSCMD**	**FirmAllocation**	**Fall BackAllocation**	**PLF to beachieved**
GVK Ind.	1-05	0-90	0-15	68.5%
Specturm	1-05	0-0-	0-15	68.5%
Lanco	1-75	1-46	0-29	80.0%
Reliance	1-00	0-64	0-36	85.0%

Therefore the contention of the petitioner is that since it is only the 2nd respondent, who is virtually monopoly supplier of natural gas, it has entered into an agreement with the

2nd respondent, and the respondents 2 and 3 are not supplying the natural gas to the extent of the firm allocation, as there is short fall in the availability of natural gas.

Further, as and when additional natural gas is available, the same is being allocated by the said

G.L. Committee and that in the Ravva Satellite field, whenever additional quantities of natural gas is found available, the Government of India vide letter, dated 18-02-2003, permitted the 2nd respondent to directly sell the same at the market price as against the Administered Price Mechanism (for short, 'APM') and allocation by the G.L. Committee. Thereupon the 3rd respondent by the letter, dated 30-06-2003, informed the petitioner that the additional volume of 0.2 MMSCMD of natural gas will be available with the Ravva Satellite Gas Field at the market price and called upon the petitioner to convey its acceptance to purchase the same at market price to meet the shortfall in requirement, if minimum additional quantity is required. The petitioner conveyed its acceptance for the entire additional availability as per the letter, dated

03-07-2003. However, it appears that such letters were written to all the independent power plants in the State.

The 1st respondent by its letter, dated 22-08-2003, had also recommended to the 2nd respondent that the petitioner's plant could not achieve the required PLF for which capacity charges are being paid by it, and therefore, recommended to supply the entire additional incremental power. Thereupon, the 3rd respondent vide letter, dated 20-10-2003, conveyed its acceptance and offered to supply additional volume of 0.20 MMSCMD from the Ravva Satellite Field at market price for a period of six months commencing from 03-10-2003. The said supply was understood as additional temporary supply of gas, and the supplemental agreement dated 20-10-2003, was entered into by the parties. Later on, the 3rd respondent by letter, dated 09-12-2003, had informed the petitioner that a further additional volume of 0.1 MMSCMD of natural gas is available from the Ravva Satellite Field on best endeavour basis for a limited period and called upon the petitioner to examine the same and inform them whether it would like to purchase the above gas to meet the shortfall in requirement. In response, the petitioner vide letter, dated 11-12-2003, conveyed its acceptance stating that it is receiving a total quantity of 0.81 MMSCMD of natural gas but the same is not sufficient, and even if the entire additional volume is supplied, there will be a shortfall in the requirement, hence, requested the 3rd respondent to arrange supply of the entire additional quantity of 0.1 MMSCMD of natural gas. Accordingly, the 3rd respondent vide its letter, dated 08-01-2004, had allocated the said additional quantity to the petitioner's plant. The 1st respondent on its part, by letter, dated 13-01-2004, had recommended for supply of additional quantity and the 3rd respondent by letter, dated 14-01-2004, intimated that the additional quantity of 0.3 MMSCMD gas would be available upto 31-07-2004 and sought the petitioner's confirmation and willingness. Immediately, the petitioner conveyed its acceptance by letter, dated 12/14-01-2004. It was further pointed out that by letter dated 31-07-2004; the 3rd respondent indicated that the additional supply would be available beyond 31-07-2004 also. The petitioner conveyed that same terms and conditions will be governed for the existing arrangements and accordingly the respondents 2 and 3 have continued to supply the gas.

It is also stated by the petitioner that on 23-08-2004, the 2nd respondent informed that the availability of additional supply of gas was indicated for a shorter duration by the producer and the same was being supplied to the petitioner on the recommendation of the A.P. TRANSCO and as the availability of additional gas is expected to continue for more time, it wanted to give an opportunity of supply to all power producers on equitable basis. Further, the 3rd respondent by letter dated 24-08-2004, informed that there is deficit supply to other power plant consumers and thus they are proposed to supply additional quantity to the extent of 0.3 MMSCMD on equitable basis. Accordingly a pro-rata supply of the said quantity that can be made available to the petitioner is 0.0375 MMSCM and sought the acceptance of the petitioner, failing which the same will be supplied to others.

The petitioner, by its letter dated 25-08-2004 informed the

3rd respondent that the deficit is much higher and therefore if the additional quantity is redistributed among power producers, the disparity to the petitioner's company is very high and it would suffer loss. Therefore, the petitioner sought for reallocation of quantity not on equitable basis, which would virtually a disparity among the consumers. In spite of the same, respondents 2 and 3 did not consider the said representation and above all the petitioner was informed that it would be getting only pro-rata supply of the additional gas to the extent of 0.0375 MMSCMD. It was stated that if such supply is restricted, the petitioner would not be able to achieve the required 85% PLF in terms of the PPA and thereby leading to liability towards penalties with the 1st respondent. The inability of the petitioner would also result it not being able to recover the full fixed charges and also would be liable to pay the penalties in terms of the PPA. Therefore, the main contention in this writ petition is that the respondents did not consider the allocation in proper perspective and depending on the requirement and other incidents of running concern of the petitioner *vis-à-vis* other projects and there being no such basis for pro-rata, the entire action on the part of the respondents is illegal. The respondents erred in not considering the representations of the petitioner, dated

04-08-2004, 14-08-2004, 24-08-2004 and 25-08-2004 and the same have remained unconsidered and no orders are being passed. Thus the main challenge by the petitioner is against the impropriety in revising the allocation

made and also inequitable allotment without keeping due regards to the requirements and other aspects. Hence, the writ petition.

In the counter affidavit filed on behalf of the respondents 2 and 3, who are the main contestants to the petitioner's claim, the crux in defence is to the effect of the very writ petition as has been filed and framed seeking supply of gas, which originally stood only on a temporary basis, would not come in any way nearer, so well, within the public law remedies as provided under Article 226 of the Constitution of India. It is also pointed out that the transaction being purely commercial contract and no relief can be sought. Even in a civil suit, the specific performance of a contract like the one in the present case is not possible; therefore, the writ petition is liable to be dismissed. It is further contended that the 2nd respondent as per the powers conferred, as to sell the gas at market price but not at APM, therefore out of the purview of APM and accordingly

0.99 MMSCMD gas is being purchased by the GAIL from the Ravva Satellite Field and the same is being supplied to the various consumers at the market price as per the proportion of their allocations as allocated by the GLC. There is no dispute in regard to the earlier supply on the temporary basis and the only dispute being in the supply of additional quantity of 0.3 MMSCMD of gas available on best endeavour and temporary basis from the Ravva Satellite Field.

No doubt, it was denied that the recommendation of the

1st respondent was taken into consideration, while deciding as to the allotment of the quantity, but the supply was exclusively not on the basis of the recommendation of the

1st respondent. It was further pointed out that these respondents have absolutely no concern, whatsoever, and on any recommendation made by the 1st respondent, the 2nd respondent has necessarily to take decision on its own on best endeavour basis. Further, it was pointed out that the gas supply from ONGC, which stood at around 5.0 MMSCMD (excluding isolated fields) in October 2003, has drastically come down to a precarious level of around 4.3 MMSCMD (excluding isolated fields) at present, which resulted in increase shortfall in meeting the firm allocation of the various consumers including power projects. However, on the reassignment of the availability position, the

2nd respondent reviewed its earlier decision of supplying the entire gas to the petitioner and a fresh decision was taken to supply the additional gas available on the best endeavour basis with a view to give opportunity to all the power projects on an equitable basis in proportion to the firm allocation of each of the power project consumer. Even as per the terms and conditions of the agreement entered into between the parties, exclusive power is conferred to review the arrangement at the end of the period and all such supply of gas would be only temporary and would not confer any preferential rights and opportunities in future allocation etc., nor it would amount to assurance. Therefore, it is contended that the petitioner has no enforceable right, since the 2nd respondent has taken a decision on equitable basis huge shortfall supply availability and best endeavour basis, the petitioner cannot seek any direction to the exclusion of all further power consumers for total supply of the gas and any such direction in these lines would be beyond the jurisdiction of this Court. Thus it is stated that the 2nd respondent has exclusive powers on its own to sell the gas on best endeavour basis directly at the market price. Accordingly the question of supplying the gas does not arise at this juncture. It is further pointed out that even according to the petitioner, the gas available would not be sufficient to meet the firm allocation. Above all, it is also stated that the decision taken by the 2nd respondent has already been implemented and entered into.

From 01-09-2004 onwards, all the power project consumers are receiving the additional gas. However, the petitioner did not respond to such offers made by the respondents. In the circumstances, it is stated that there are no merits in the writ petition and the same is liable to be dismissed.

In the counter affidavit filed by the 4th respondent, apart from reiterating the very same pleadings as stated on behalf of the respondents 2 and 3 in their counter affidavit, it was further pointed out that as per the decision of this Court in ***GVK Industries Limited, Hyd., v. Union of India,*** wherein it was held that when the rights of the parties in the agreement are purely contractual in its nature, the same cannot be termed as statutory one. Further, having regard to

the principles laid down by the Apex court, no enforcement can be made in a remedy provided under Article 226 of the Constitution of India. Further it is also pointed out that the 4th respondent was in existence much prior to the others and it is an earliest power project that has been established under the liberalization policy. The allocation with the petitioner in its original company was to generate natural gas as primary fuel and Naphtha as alternative fuel was denied. Therefore, it is stated that the petitioner has absolutely no right and cannot seek any supply.

In the counter affidavit filed on behalf of the
1st respondent, it is stated similar to reiteration except to the extent that it had no role to the supply made by the
2nd respondent, which has its own exclusive discretion. Though several other allegations are referred, they are not much relevant to the main issue arising in this writ petition. Apart from that, it is also stated that it had also no concern with any of the aspects or the policy matters, which has to be decided by the 2nd respondent and agreement or any correspondence between the petitioner and respondents 2 and 3.

Heard the learned counsel for both sides and considered their respective submissions and perused the entire material available on record.

The main question that fall for consideration is "*whether in the facts and circumstances the petitioner can seek additional supply of gas as claimed by it ?*"

On considering the above facts and circumstances culled out from the respective pleadings of both the parties, there is no dispute with regard to the establishment of projects in the State and the permission granted according to the requirement of each project depending on its capacities and it has to be necessarily made by the 2nd respondent on due allocation. There is already agreement between the petitioner and respondents 2 and 3, since its inception

on par with the contesting respondents. As pointed out by both the parties, the main dispute pertains to the allotment of quota as additional supply from out of the availability of the additional gas from the Ravva Satellite Fields. The complaint of the petitioner is that the said allotment does not run on the lines of the terms and conditions and also as per the requirement and further any such deficit in supply would virtually affect its running and also the ultimate target achievement.

The contention of the respondents 2 and 3 is to the effect that apart from the question as to the maintainability of the writ petition under Article 226 of the Constitution of India, the allotment of additional supply of gas was made on pro-rata basis and therefore the petitioner cannot make grievance thereto. Apart from the petitioner, several other power projects are also in existence in the State, which are also in need of such supply. The claim of the petitioner for enforcement of the requirement of additional supply of gas pursuant to the agreement is exorbitant demand.

Naturally every industry would try to seek such supply for the purpose of meeting their requirements and especially to achieve the targets and there is no dispute on par with the power projects. The petitioner has to seek supply for the purpose of meeting its requirement as per the demand.

All these projects have been established and encouraged by the State under its liberalization policy with a view to meet the ultimate demand in the market. No doubt, an argument was also built that such an action on the part of respondents 2 and 3 in allotting less quota is arbitrary and as to how less quota was allotted to the petitioner was not explained, in any way, varying with the pro-rata basis, comparing with the other power projects. In regard to the allotment of supply of additional gas, ultimately no data or statistics are putforth from either side to prove such pro-rata basis, and its effect on additional supply of gas which necessarily has to be provided to meet the needs of the every individual power project including the petitioner and the same has to be based upon rational basis unhampered by any other considerations. However, having regard to the principles laid down it would be very much stale in directing any such action on the part of the authorities. However, that itself is not a rule to take out from the jurisdiction but as rightly pointed out, as along as arbitrary is not found, this Court would not step into such arena. These are the materials facts, which are necessarily to be considered by the authorities concerned by

taking into consideration various facts and circumstances to come to a conclusion. Admittedly, there was no such material except seeking all the power projects including the petitioner for consent as their requirement for supply of additional gas; no other aspect has been brought forth to put them on notice. On receipt of such consents, the 2nd respondent has taken a decision, though; it is stated to be on equitable basis.

The reference made on behalf of the petitioner in regard to the representations filed by him on various dates i.e.,

04-08-2004, 14-08-2004, 24-08-2004 and 25-08-2004 and no orders have been passed thereon. Subsequent to such representations being made pointing out the petitioner's requirement, no decision was taken thereon though the difficulties were apparent. These are all matters necessarily have to be considered by the respondents 2 and 3 vis-à-vis requirements of the other similarly placed power projects.

It is suffice in the interest of justice to direct the respondents to consider the said representations than going into the various submissions made which on the face of it run beyond the scope of the powers of this Court.

In the circumstances, without expressing any opinion on the respective contentions as made on behalf of both the parties, the writ petition is disposed of directing the respondents 2 and 3 herein to consider the aforesaid representations and pass orders in accordance with law after giving notice to the petitioner and also to the contesting respondents including the other power projects. The entire exercise shall be completed within a period of one month from the date of receipt of a copy of this order.

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B.PRAKASH RAO, J

Dated:04-07-2005

LSK

To

1 The Transmission Corporation of A.P.Ltd., Vidyut Soudha, Hyderabad. Rep. By it Chairman and Managing Director.
2 The GAIL (India) Limited 16, Bhilkaji Cama Place R.K.Puram, New Delhi-110066. rep. By its Chairman and Managing Director.
3 The Zonal General Manager GAIL (India) Ltd., 6-3-871 3rd floor, Snehalata Complex, Begumpet, Hyd.
4 The Director S. Bhupal, S/o. Late Krishna Ram Bhupal M/s. G.V.K. Industries Limited, R/o. Hyderabad. Registered Office at Paigah House, S.P. Road, Secunderabad.
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(RR4 to RR6 are impleaded as per Court Order Dt. 9-9-04 in WPMP's 20732, 20907 &20911/04 respectively.

7 Two C.D. copies.